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3 Including Professional Corporations

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12 UNITED STATES DISTRICT COURT  
13 CENTRAL DISTRICT OF CALIFORNIA  
14 WESTERN DIVISION  
15  
16

17 BETWEEN THE LINES  
18 PRODUCTIONS, LLC a California  
19 limited liability company,

20 Plaintiff,

21 v.

22 LIONS GATE ENTERTAINMENT  
23 CORP., a British Columbia corporation,  
24 and SUMMIT ENTERTAINMENT,  
25 LLC, a Delaware limited liability  
26 company,

27 Defendants.  
28

29 AND RELATED COUNTERCLAIMS.

Case No. 2:14-cv-00104-R (PJWx)

**DEFENDANTS' MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT OF THEIR MOTION  
FOR COSTS PURSUANT TO  
FED.R.CIV.P. 41(d)**

Date: May 19, 2014

Time: 10:00 a.m.

Location: Spring St., Courtroom 8

Judge: Hon. Manuel L. Real

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1 **I. INTRODUCTION**

2 It is manifestly unfair for Plaintiff Between the Lines Productions, LLC  
3 (“Plaintiff”) to file a lawsuit in New York, compel defendant Lions Gate  
4 Entertainment Inc.’s (“Lionsgate”) and defendant and counter-claimant Summit  
5 Entertainment, LLC’s (“Summit”) (collectively, “Defendants”) disbursement of  
6 expenses and attorneys’ fees in defense thereof, and then voluntarily dismiss the  
7 case after it was transferred to California, only to file a nearly identical case  
8 immediately thereafter back in New York. Clearly, Defendants should not have to  
9 bear costs expended for work in the first action which they cannot use in the second  
10 action. Fed.R.Civ.P. 41(d), which gives the Court discretion to award Defendants  
11 their costs and attorneys’ fees rendered useless by Plaintiff’s dismissal and  
12 subsequent recommencement of an action, was created specifically to rectify such  
13 potential injustices. The awarding of Defendants’ expenses and fees is particularly  
14 appropriate in this case as Plaintiff and its counsel cannot establish any justifiable  
15 reasons for its/their actions. Instead, after racking up significant costs for  
16 Defendants due to its vexatious actions which had nothing to do with the merits of  
17 the parties’ dispute, Plaintiff voluntarily dismissed its first action and immediately  
18 thereafter commenced the second in a blatant attempt to forum shop (for the second  
19 time), try the case before another judge, and avoid hearing on Defendants’ pending  
20 motions to dismiss and compel.

21 Defendants’ costs, including attorneys’ fees, expended in the First Action  
22 which resulted in work not useful to the Second Action, total \$52,303.27. As set  
23 forth below and in the accompanying declaration of Paul Bost, which includes  
24 copies of Defendants’ billing records, Defendants’ costs are reasonable given the  
25 amount of work generated by Plaintiff’s and its counsel’s vexatiousness and  
26 litigiousness, as described in greater detail below. The amount of Defendants’  
27 attorneys’ fees is reasonable in light of the fees charged by attorneys of comparable  
28 skill and experience, and the quantity of Defendants’ attorneys’ work is reasonable

1 in relation to the tasks at issue.

## 2 **II. RELEVANT FACTUAL BACKGROUND**

3 Plaintiff seeks a declaration from the Court that its motion picture *Twiharder*  
4 does not infringe Summit's copyrights in and trademarks associated with the motion  
5 picture *Twilight* and its sequels (the "*Twilight* Motion Pictures"). Plaintiff initially  
6 asserted this primary claim in a 219-page complaint filed in the Southern District of  
7 New York on May 28, 2013, which was assigned to the Hon. Jed S. Rakoff and  
8 given case number 1:13-cv-03584-JSR (the "First Action"). In that complaint,  
9 Plaintiff asserted the following claims: (1) declaratory judgment that *Twiharder*  
10 constituted a fair use of the *Twilight* Motion Pictures; (2) violation of the Digital  
11 Millennium Copyright Act ("DMCA"); (3) violation of the Sherman Anti-trust Act;  
12 and (4) cancellation of certain of Summit's TWILIGHT trademarks. Plaintiff also  
13 sought certification of challenge to the constitutionality of the Copyright Act's fair  
14 use test. [Dkt No. 1 of the First Action.] On June 28, 2013, Defendants filed a  
15 motion to transfer venue of the case to the Central District of California under 28  
16 U.S.C. § 1404. [Dkt. No. 11 of the First Action.] On July 18, 2013, and pursuant to  
17 the scheduling order issued by Judge Rakoff [Dkt No. 17 of the First Action],  
18 Defendants served Plaintiff with its first set of requests for production of documents  
19 and first set of interrogatories. (Bost Decl. ¶ 2.) On July 30, 2013, Judge Rakoff  
20 granted Defendants' motion to transfer [Dkt. No. 29 of the First Action], and the  
21 action was transferred to the Central District of California, where it was assigned to  
22 the Hon. Margaret M. Morrow. Shortly thereafter, the parties entered a stipulation,  
23 which, among other things, extended Defendants' deadline to respond to Plaintiff's  
24 complaint and to mutually withdraw their respective first sets of interrogatories.  
25 [Dkt No. 30 of the First Action.] (Bost Decl. ¶ 3, Ex. A.)

26 Once the action was transferred to the Central District of California,  
27 Defendants filed two motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiff  
28 did not file an opposition to Defendants' first motion, which sought dismissal of

1 Plaintiff's antitrust, trademark cancellation, and DMCA claims. [Dkt. No. 39 of the  
 2 First Action.] Instead, Plaintiff filed a 186-page first amended complaint ("FAC")  
 3 pursuant to Fed.R.Civ.P. 15(a)(1)(B). In its FAC, Plaintiff voluntarily dismissed its  
 4 trademark cancellation and DMCA claims and restyled its original declaratory  
 5 judgment claim into five separate declaratory judgment claims, namely, a copyright  
 6 First Amendment declaratory judgment claim, a copyright misuse declaratory  
 7 judgment claim, a copyright fair use declaratory judgment claim, a trademark statute  
 8 of limitations declaratory judgment claim, and a Lanham Act laches declaratory  
 9 judgment claim. [Dkt. No. 46 of the First Action.] Plaintiff refused to serve  
 10 Defendants with a copy of the FAC despite the clear instruction of Local Rule 5-  
 11 3.1.1 requiring "[d]ocuments presented to the Clerk for filing or lodging in paper  
 12 format pursuant to L.R. 5-4.2 [to] be served in accordance with [FRCP] 5." (Bost  
 13 Decl. ¶ 6, Ex. B.)

14 Despite Plaintiff's refusal to properly serve them, Defendants filed their  
 15 second motion to dismiss on October 22, 2013, which again sought dismissal of  
 16 Plaintiff's antitrust claim and set hearing for December 2, 2013. [Dkt. No. 52 of the  
 17 First Action.] Plaintiff never filed an opposition to this motion. Instead, Plaintiff  
 18 launched the series of filings – none of which is related to the underlying merits of  
 19 the parties' dispute or useful to Defendants in the present action – described  
 20 immediately below:

- 21 • On October 25, 2013, Plaintiff filed an application for entry of default  
 22 despite Defendants' then-pending Fed.R.Civ.P. 12(b)(6) motion and its  
 23 failure to serve Defendants with its FAC. [Dkt. Nos. 55 and 55-1 of the  
 24 First Action.] The Clerk's office forwarded the application to Judge  
 25 Morrow, because it was unable to determine based on the record if  
 26 default should be entered. [Dkt. No. 56 of the First Action.]
- 27 • On November 6, 2013, Plaintiff filed a statement of objections to the  
 28 Clerk's forwarding of the application for default to Judge Morrow.

1 [Dkt. No. 58 of the First Action.]

- 2 • Next, on November 12, 2013, Plaintiff filed an application to the Clerk  
3 of Court protesting the December 2, 2013 hearing date noticed for  
4 Defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss, despite the fact  
5 that at the parties' scheduling conference before Judge Morrow,  
6 Defendants were granted leave to have their motion heard on December  
7 2, 2013. [Dkt. No. 61 of the First Action.]
- 8 • Plaintiff then filed a statement of objections – not an opposition – to  
9 Defendants' motion to dismiss and to Judge Rakoff's July 30, 2013  
10 order transferring venue of the First Action to the Central District of  
11 California. [Dkt. No. 63 of the First Action.]
- 12 • After Judge Morrow issued an order making it clear that hearing on  
13 Defendants' motion to dismiss was scheduled for December 2, 2013,  
14 Plaintiff filed a motion to strike Judge Morrow's "counterfeit" order.  
15 [Dkt. Nos. 64 and 64-1 of the First Action.]
- 16 • Plaintiff then filed a statement of objections to Judge Morrow's  
17 Scheduling Order and the transcript of the Scheduling Conference.  
18 [Dkt. No. 66 of the First Action.] Among its many impassioned  
19 objections to Judge Morrow's procedures and handling of the case thus  
20 far, Plaintiff stated that it "has reasonable grounds to believe that upon  
21 transfer of venue from New York, this civil action was not randomly  
22 assigned to the presiding Honorable Judge." *Id.* (All capital letters in  
23 original.)

24 On November 26, 2013 and in receipt of Plaintiff's numerous filings, Judge  
25 Morrow issued an order construing Plaintiff's filings as a motion to recuse, which  
26 was subsequently randomly assigned to Judge Beverly Reid O'Connell. [Dkt. Nos.  
27 67 and 69 of the First Action.] On December 3, 2013, Judge O'Connell issued an  
28 order denying Plaintiff's motion to recuse. [Dkt. No. 70 of the First Action.] Judge



1 Morrow subsequently ordered hearing on Defendants' Fed.R.Civ.P. 12(b)(6) motion  
 2 to dismiss for January 13, 2014 and ordered Plaintiff to file its opposition by  
 3 December 13, 2013. [Dkt. No. 71 of the First Action.]

4 Also, on December 6, 2013, Defendants filed a motion to compel Plaintiff's  
 5 service of written responses without objections and production of responsive  
 6 documents to their first set of requests for production. [Dkt. No. 72 of the First  
 7 Action.] As noted above, Defendants served their first set of requests for  
 8 production on July 18, 2013, but Plaintiff did not bother to serve responses to them  
 9 until November 5, 2013, which were replete with objections. Also, Plaintiff refused  
 10 to participate in the joint stipulation process set forth in Local Rule 37, forcing  
 11 Defendants to prepare both a joint stipulation and a motion to compel. (Bost Decl.  
 12 ¶¶ 4-5.)

13 Ultimately, while Defendants' motion to compel was pending, after Plaintiff's  
 14 application for entry of default and motion to recuse were denied, and on the day its  
 15 opposition to Defendants' second motion to dismiss was due, Plaintiff voluntarily  
 16 dismissed the First Action without prejudice pursuant to Fed.R.Civ.P. 41(a)(1).  
 17 [Dkt. No. 73 of the First Action.]

18 The very next business day, December 16, 2013, Plaintiff re-filed its case –  
 19 the present action – again in the Southern District of New York (the “Second  
 20 Action”). Plaintiff's complaint in the Second Action included three claims for  
 21 relief, namely, a copyright non-infringement declaratory judgment claim, a  
 22 trademark non-infringement/non-dilution declaratory judgment claim, and a prima  
 23 facie tort claim under the New York common law. [Dkt. No. 1.] In its Civil Case  
 24 Cover Sheet, Plaintiff noted that this case was related to the First Action.<sup>1</sup> The

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25  
 26 <sup>1</sup> Although Plaintiff's complaint in the Second Action does not include antitrust  
 27 or trademark cancellation claim, Plaintiff suggests that it still intends to seek such  
 28 relief in the Second Action. See Plaintiff's Memorandum of Law in Support of its  
 Motion to Dismiss Defendants' Counterclaims, Dkt. No. 25, p. 27 (“BTL intends to

1 Second Action was again assigned to Judge Rakoff. Defendants informed Judge  
 2 Rakoff of the status of the First Action, which he transferred to this District, in a  
 3 letter dated December 30, 2013 and requested that Plaintiff and its counsel be  
 4 sanctioned. (Bost Decl. ¶ 7, Ex. C.) At the initial conference held on January 6,  
 5 2014, Plaintiff admitted that this action was related to its prior action:

6 **The Court:** Let me make sure I understand what's  
 7 happened in this case. When the related case was first  
 8 before this court, I transferred it to the Central District of  
 9 California. Then, plaintiff, you, dismissed the California  
 10 action and re-filed the action in New York. Do I have  
 11 that right?

12 **Plaintiff's counsel:** Correct. It's not quite the same  
 13 action, but it's certainly similar.

14 (Bost Decl. ¶ 8, Ex. D.)

15 Judge Rakoff *sua sponte* transferred the action – again – to the Central  
 16 District of California on the grounds that it was “a blatant case of attempting to  
 17 evade the transfer of this case to California.” *Id.* Judge Rakoff further noted on the  
 18 record that it was “only because [Defendants’ counsel] is not here will I not hear  
 19 argument on whether sanctions should be imposed on [P]laintiff’s counsel.” *Id.*  
 20 After transfer of the matter to this Court and the Hon. Judge Real, Plaintiff filed  
 21 with Judge Rakoff a motion to certify his transfer orders in the First and Second  
 22 Actions for interlocutory appeal to the Second Circuit Court of Appeals. Judge  
 23 Rakoff denied Plaintiff’s motion. [Dkt No. 20.]

24 **III. THE COURT SHOULD ORDER PLAINTIFF AND/OR ITS COUNSEL  
 25 TO PAY DEFENDANTS THEIR EXPENSES AND ATTORNEYS’  
 26 FEES EXPENDED IN THE FIRST ACTION THAT ARE NOT  
 27 USEFUL IN THE SECOND ACTION AND STAY THESE  
 28 PROCEEDINGS PENDING COMPLIANCE**

Fed.R.Civ.P. 41(d) provides the following:

Costs of a Previously Dismissed Action. If a plaintiff

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petition the Court, or the appropriate executive agency, to cancel Lions Gate’s  
 trademarks and copyrights associated with The Twilight Saga on account of its  
 antitrust violations.”)

1 who previously dismissed an action in any court files an  
 2 action based on or including the same claim against the  
 3 same defendant, the court:  
 4 (1) may order the plaintiff to pay all or part of the costs  
 of that previous action; and  
 (2) may stay the proceedings until the plaintiff has  
 complied.

5 This Rule “is an expression of the Court’s inherent power to protect defendants from  
 6 the harassment of repeated lawsuits by the same plaintiff on the same claims.” *Jurin*  
 7 *v. Google, Inc.*, 695 F. Supp.2d 1117, 1123 (E.D. Cal. 2010) (motion for costs,  
 8 which included attorneys’ fees, granted).

9 In order to determine if a plaintiff should be ordered to pay a defendant’s  
 10 costs in a prior action, “the court should simply assess whether a plaintiff’s conduct  
 11 satisfies the requirement of [Fed.R.Civ.P.] 41(d), and whether the circumstances of  
 12 the case warrant an award of costs to prevent prejudice to the defendant.” *Esquivel*  
 13 *v. Arau*, 913 F. Supp. 1382, 1388 (C.D. Cal. 1996). Courts have looked to a number  
 14 of factors to guide their discretion in whether to award costs pursuant to  
 15 Fed.R.Civ.P. 41(d):

16 (1) whether there is any indication of vexatious intent or  
 17 forum shopping; (2) whether dismissal was an attempt to  
 18 gain a tactical advantage; (3) whether dismissal was  
 19 designed to avoid court-imposed deadlines or other  
 20 unfavorable rulings; (4) whether the merits of the case  
 21 were reached in the previous action or whether instead  
 dismissal turned on procedural issues; (5) whether the  
 moving party sought costs at the time of the dismissal;  
 (6) whether the plaintiffs are financially able to bear the  
 costs of the prior action; and (7) whether the previous  
 suit was vulnerable at the time it was dismissed.

22 *Simmonds v. Geeknet, Inc.*, 2013 U.S. Dist. LEXIS 17560, at \*5 (W.D. Wash.  
 23 February 7, 2013) (court awarded costs, including attorneys’ fees, finding factors 2,  
 24 3, 4, 6, and 7 persuasive) (footnotes omitted).

25 **A. Plaintiff’s Conduct Satisfies the Conditions of Fed.R.Civ.P. 41(d)**  
 26 **and the Circumstances of the Case Warrant an Award of Costs**  
**and Attorneys’ Fees**

27 There is no question that Plaintiff’s voluntary dismissal of the First Action  
 28 and commencement of the Second Action squarely satisfy the requirements of

1 Fed.R.Civ.P. 41(d). The parties in the First Action and Second Action are identical,  
2 i.e., Plaintiff is the sole plaintiff in both, and Defendants are the sole defendants in  
3 both.

4 Likewise, the Second Action is based on or includes the same claims of the  
5 First Action. *See Esquivel*, 913 F. Supp. at 1387 (plaintiff's second action found to  
6 be based on or include the same claims in the first action when second action  
7 incorporated all previous claims and included additional claims and "the operative  
8 facts alleged are essentially the same"); *Jurin*, 695 F. Supp.2d at 1123 ("[i]t appears  
9 that Plaintiff has simply re-filed an amended version of his earlier suit"); *Geeknet*,  
10 2013 U.S. Dist. at \*4 ("the differences between the two actions are mostly cosmetic;  
11 this case has the same operative facts, names the same parties, and involves the  
12 same conduct as the previous claim.") The fundamental claims of and facts  
13 underlying both Actions are the same. Both Actions center around Plaintiff's  
14 attempt to exploit its *Twiharder* motion picture, which it claims is a parody of the  
15 *Twilight* Motion Pictures, and Summit's belief that *Twiharder* and its related media  
16 and merchandise infringe its rights in the *Twilight* Motion Pictures. In both Actions,  
17 Plaintiff's fundamental claims are for declaratory judgment, i.e., a declaration that  
18 its exploitation of the *Twiharder* motion picture does not infringe Summit's  
19 copyrights and trademarks related to and derived from the *Twilight* Motion Pictures.  
20 In the First Action, Plaintiff supplemented these fundamental claims with other  
21 "money" claims, i.e., antitrust, DMCA, and trademark cancellation claims seeking  
22 damages or other relief. Similarly, in the Second Action, Plaintiff supplemented  
23 these claims with a New York common law prima facie tort claim seeking damages.  
24 However, the Actions' core claims and facts are identical.

25 Plaintiff has admitted the identity of the First and Second Actions on the  
26 record. It certified the Second Action as related to the First Action on the civil case  
27 cover sheet. When Judge Rakoff asked Plaintiff's counsel if Plaintiff dismissed the  
28 First Action and "re-filed [it] in New York," he responded, "Correct. It's not quite

1 the same action, but it's certainly similar." (Bost Decl. ¶ 8, Ex. D.) In fact, it was  
 2 because of the identity of the actions that Judge Rakoff, again, transferred the  
 3 Second Action to this District. In Plaintiff's denied *ex parte* application to stay this  
 4 matter for 60 days, Plaintiff equates the First and Second Actions, stating it filed the  
 5 Second Action "to situation this action in its Original Forum." [Dkt. No. 17, p. 9.]  
 6 Plaintiff makes the same argument in its (also denied) motion to certify Judge  
 7 Rakoff's transfer orders for interlocutory appeal and its pending motion to dismiss  
 8 Summit's counterclaims. [Dkt. No. 25, pp. 17-20.]<sup>2</sup> Clearly, Plaintiff views the  
 9 First Action and Second Action as equivalents; the Court should also.

10 In order to obtain relief under Fed.R.Civ.P. 41(d), Defendants need not  
 11 establish that Plaintiff demonstrated "bad faith." *See Esquivel*, 913 F. Supp. at  
 12 1388. Instead, it is sufficient that Plaintiff cannot "present a persuasive explanation"  
 13 for its voluntary dismissal of the First Action and commencement of the Second  
 14 Action. *Id.* Additionally, application of the factors set forth in *Geeknet* (and quoted  
 15 above) show that Defendants, like the *Geeknet* defendant, are prime candidates for  
 16 relief under Fed.R.Civ.P. 41(d). Plaintiff's vexatious intent and forum-shopping by  
 17 filing (and refiling) its lawsuit against Defendants in the Southern District of New  
 18 York is undisputed. Plaintiff voluntarily dismissed the First Action in order to avoid  
 19 trial before Judge Morrow, who it alleged was not randomly assigned the First  
 20 Action and unsuccessfully moved to recuse. Plaintiff also voluntarily dismissed the  
 21 First Action in order to avoid hearing on Defendants' then-pending motion to  
 22 compel Plaintiff's responses without objection to Plaintiff's first set of document  
 23 requests. Plaintiff also voluntarily dismissed the First Action in order to avoid a  
 24 ruling on Defendants' then-pending motion to dismiss Plaintiff's antitrust claim.

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25  
 26 <sup>2</sup> Likewise, on March 28, 2014, Plaintiff filed a petition for writ of mandamus  
 27 to the Second Circuit Court of Appeals seeking its review of Judge Rakoff's transfer  
 28 of the First and Section Actions. [Dkt. No. 28.] Plaintiff's writ is pending, and the  
 Second Circuit has not issued any orders relating to it.

1 Defendants had twice filed motions to dismiss Plaintiff's antitrust claim, and on  
2 both occasions Plaintiff avoided briefing the issues raised therein - first, amending  
3 its complaint as a matter of right and, second, seeking to invalidate Defendants'  
4 motion by taking issue with the hearing date and then voluntarily dismissing its  
5 lawsuit. *See Esquivel*, 913 F. Supp. at 1387 (the plaintiff's "decision to refile her  
6 action in the Central District of California and then file the notice of dismissal in the  
7 Southern District [of New York] action without responding to defendants' motion to  
8 dismiss for lack of personal jurisdiction appears to have been a recognition that her  
9 suit in the Southern District was vulnerable on the grounds asserted in the motion.")  
10 Also, Defendants were precluded from seeking their costs at the time of, and as a  
11 condition of, dismissal as Plaintiff's voluntary dismissal pursuant to Fed.R.Civ.P.  
12 41(a)(1) effectively terminated the First Action and the court's jurisdiction.

13 **B. Defendants Are Entitled to Expenses and Attorneys' Fees in the**  
14 **Amount of \$52,303.27**

15 When, as is the case here, the criteria of Fed.R.Civ.P. 41(d) are met, the Court  
16 has the discretion to order Plaintiff to pay all or part of the costs expended by  
17 Defendants in the First Action. Compensable costs include, but are not limited to,  
18 pro hac vice and other court fees, and charges for computerized legal research,  
19 messengers, express delivery, postage, duplication, and telephone usage. *Esquivel*,  
20 913 F. Supp. at 1393; *Aloha Airlines, Inc. v. Mesa Air Group, Inc.*, 2007 U.S. Dist.  
21 LEXIS 97678, at \*21 (D. Haw. July 20, 2007). Additionally, it is well established  
22 that an award of costs under Fed.R.Civ.P. 41(d) includes attorneys' fees. *See*  
23 *Esquivel*, 913 F. Supp. at 1392 ("defendants are entitled to both expenses and  
24 attorneys' fees that are reasonably incurred and that will not contribute toward  
25 defendants' defense in the present case"); *Aloha*, 2007 U.S. Dist. at \*8 ("The  
26 majority of courts . . . have awarded attorneys' fees under 41(d) outright,  
27 recognizing that including attorneys' fees as part of an award of costs is consistent  
28 with the purposes of Rule 41(d)"); *Geeknet*, 2013 U.S. Dist. at \*7 (same). Finally,



“a court should not award costs associated with past work that will still be useful to defendants in the present litigation.” *Holt v. Kormann*, 2012 WL 5829864, at \*5 (C.D. Cal. Nov. 15, 2012) (awarding defendant \$78,581.94, the amount of legal fees expended by defendant defending the first action.)

### 1. Defendants’ Expenses

Although Defendants incurred other expenses in the First Action, Defendants specifically seek reimbursement of the following charges because they are clearly not associated with past work that will be useful to them in the present action:

Type of Expense	Amount
Pro Hac Vice-Related Fees, including Shipping/Federal Express Charges	\$509.68
Transportation Costs for July 3, 2013 initial status conference (airfare to and from New York and cab rides in New York)	\$523.09

(Bost Decl. ¶ 9, Ex. E.)

First, Defendants’ attorneys’ Pro Hac Vice applications in the First Action do not benefit Defendants in the Second Action. Second, Defendants’ lead counsel’s transportation costs incurred attending the July 3, 2013 Status Conference with Judge Rakoff are not useful to them in the Second Action, as this conference was particular to the First Action and is without significance in the Second Action.<sup>3</sup> In sum, Defendants are entitled to reimbursement of costs totaling \$1,032.77.

### 2. Defendants’ Attorneys’ Fees

“Fee awards are calculated using the ‘lodestar’ method, which is obtained by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate . . . There is a ‘strong’ presumption that the lodestar method results in a

<sup>3</sup> As an indicator of its good faith, Defendants are not seeking reimbursement of their lead counsel’s substantially more significant travel costs incurred attending hearing on Defendants’ successful motion to transfer in the First Action.

reasonable fee.” *Holt*, 2012 WL at \*6, citing *Purdue v. Kenny A.*, 559 U.S. 542, 543, 130 S.Ct. 1662 (2010).

The lodestar for purposes of this motion totals \$51,270.50 for 118 hours of work.

**a. Defendants’ Attorneys’ Hourly Rates Are Reasonable**

Reasonable hourly rates are “calculated according to the prevailing market rates in the relevant community.” *Blum v. Stevenson*, 465 U.S. 886, 895, 104 S.Ct. 1541 (1984). “If the requested rates are in line with those prevailing in the community for similar services of lawyers of reasonably comparable skill and reputation, it is deemed to be reasonable.” *Aloha*, 2007 U.S. Dist. at \*13-14.

The lead attorneys in this case charged the following hourly rates for their services:

Attorney	Hourly Rate
Jill M. Pietrini	\$550.00
Theodore C. Max	\$598.25
David R. Garcia	\$550.00
Helen Cho Eckert	\$525.00
Paul A. Bost	\$395.00

(Bost Decl. ¶ 12, Ex. F.) Regardless of whether the relevant legal market is New York, New York or Los Angeles, California, the hourly rates charged by Defendants’ attorneys are reasonable. These and other rates charged by Sheppard Mullin are consistent with the reputation and experience of the attorneys and professionals who performed the services. The average billing rates for equity partners, non-equity partners, senior associates, and mid-level associates specializing in litigation at Sheppard Mullin’s peer firms are, respectively, \$716, \$572, \$487, and \$409 per hour. (Bost Decl. ¶ 13.) Such rates are customarily charged for similar work performed in Los Angeles and New York. Sheppard Mullin is an AV-rated firm in the Martindale-Hubble listing, and the high quality of



its attorneys representing Defendants in the First and Second Action is not subject to dispute. (Bost Decl. ¶¶ 10-12.)

**b. Defendants' Attorneys Expended a Reasonable Number of Hours**

Courts 'should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case' . . . Typically, "[a]n attorney's sworn testimony that, in fact, [he] took the time claimed . . . is evidence of considerable weight on the issue of the time required." *Holt*, 2012 WL at \*6, *citing Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008) and *Blackwell v. Foley*, 724 F. Supp.2d 1068, 1081 (N.D. Cal. 2010).

Defendants seek reimbursement of time expended by their attorneys undertaking and relating to tasks undertaken in the First Action that will not be useful to them in the Second Action, including the following:

- Reviewing Plaintiff's initial and amended complaints in the First Action, which totaled 219 and 186 pages, respectively;
- Reviewing and executing Plaintiff's waiver of service of summons and complaint and all documents appended thereto, including documents reflecting Judge Rakoff's participation in the Complex Litigation Pilot Project in the Southern District of New York [Dkt. Nos. 2 and 7 of the First Action];
- Assembling and filing pro hac vice applications and notices of appearances, and reviewing Plaintiff's counsel's post-transfer pro hac vice application;
- Reviewing scheduling and other orders issued by Judge Rakoff not addressing the merits of the parties' dispute, and drafting related documents, including the parties' proposed civil case management plan and attachments thereto [Dkt. No. 8 of the First Action];
- Attending the initial status conferences before Judge Rakoff and Judge Morrow and scheduling deadlines set at the respective conferences;
- Corresponding and conferring with Plaintiff's counsel regarding the parties' Fed.R.Civ.P. 26(f) conference (as opposed to participating in

1 the conference itself, even though the usefulness of the conference to  
2 Defendants in the Second Action is suspect);

- 3 • Corresponding and conferring with Plaintiff's counsel regarding – and  
4 revising and reviewing – the parties' stipulation to extend certain  
5 deadlines, provide for service by email, withdraw previously served  
6 interrogatories, and vacate the scheduling order issued by Judge Rakoff  
7 [Dkt. No. 30 of the First Action] (Bost Decl. ¶ 3, Ex. A);
- 8 • Corresponding and conferring with Plaintiff's counsel regarding  
9 Plaintiff's failure to timely respond to Defendants' first set of requests  
10 for production of documents and things and drafting a joint stipulation  
11 and motion to compel Defendants' responses thereto [Dkt. No. 72 of the  
12 First Action] (Bost Decl. ¶¶ 2-5);
- 13 • Corresponding and conferring with Plaintiff's counsel regarding – and  
14 revising and reviewing – the parties' stipulation allowing Plaintiff an  
15 extension of time to respond to Defendants' initial motion to dismiss  
16 [Dkt. No. 43 of the First Action];
- 17 • Corresponding and conferring with Plaintiff's counsel regarding – and  
18 drafting and revising – a potential stipulation allowing Defendants an  
19 extension of time to respond to Plaintiff's first amended complaint;
- 20 • Corresponding and conferring with Plaintiff's counsel regarding a  
21 potential stipulation allowing Plaintiff an extension of time to respond to  
22 Defendants' second motion to dismiss;
- 23 • Corresponding and conferring with Plaintiff's counsel regarding  
24 Plaintiff's failure to properly serve Defendants with its first amended  
25 complaint (Bost Decl. ¶ 6, Ex. B);
- 26 • Jointly drafting with Plaintiff's counsel the parties' joint Fed.R.Civ.P.  
27 26(f) report for submission to Judge Morrow [Dkt. No. 49 of the First  
28 Action];
- Reviewing and conferring with Plaintiff's counsel threatening a motion  
for Rule 11 sanctions for Defendants' failure to assert counterclaims and  
proposing that the proceedings be phased (Bost Decl. ¶ 14, Ex. G);
- Reviewing and responding to Plaintiff's motion for default judgment  
[Dkt. Nos. 55 and 57 of the First Action];

- 1 • Reviewing Plaintiff’s statement of objections to the Clerk’s forwarding
- 2 of the application for default to Judge Morrow [Dkt. No. 58 of the First
- 3 Action];
- 4 • Reviewing Plaintiff’s application to the Clerk of Court protesting the
- 5 December 2, 2013 hearing date noticed for Defendants’ second motion
- 6 to dismiss [Dkt. No. 61 of the First Action];
- 7 • Reviewing and responding to Plaintiff’s statement of objections – not a
- 8 substantive opposition – to Defendants’ second motion to dismiss and to
- 9 Judge Rakoff’s July 30, 2013 order transferring venue [Dkt. Nos. 63 and
- 10 65 of the First Action];
- 11 • Reviewing Plaintiff’s motion to strike Judge Morrow’s “counterfeit”
- 12 order confirming that hearing on Defendants’ motion to dismiss was
- 13 scheduled for December 2, 2013 [Dkt. No. 64 of the First Action];
- 14 • Reviewing Plaintiff’s statement of objections to Judge Morrow’s
- 15 Scheduling Order and the transcript of the Scheduling Conference [Dkt.
- 16 No. 66 of the First Action]; and
- 17 • Reviewing Judge O’Connell’s order denying Plaintiff’s motion to
- 18 recuse. [Dkt. No. 70 of the First Action.]

17 Defendants submit herewith copies of billing records reflecting their attorneys’  
 18 expense of reasonable hours undertaking the foregoing tasks. (Bost Decl. ¶ 14,  
 19 Ex. H.)

20 None of the foregoing tasks is useful to Defendants in the Second Action.  
 21 Instead, each of these tasks relate solely and exclusively to the First Action. They  
 22 do not relate to the fundamental merits of the parties’ dispute or procedural issues  
 23 that survived Plaintiff’s voluntary dismissal of the First Action, but instead non-  
 24 substantive issues that were mooted by Plaintiff’s voluntary dismissal of the First  
 25 Action. Unlike some of the tasks described below, the above tasks were not  
 26 “expended towards building intellectual capital and establishing precedent that may  
 27 be useful in this action.” *Geeknet*, 2013 U.S. at \*7. The Court should not entertain  
 28 any argument from Plaintiff that Defendants’ attorneys’ fees are excessive. Plaintiff

1 has no one to blame but itself or its counsel for the extraordinary amount of “make-  
 2 work” it created during the First Action, whether it be its refusal to participate in  
 3 discovery in good faith, its failure to abide by the Local Rules, its many  
 4 correspondences and demands regarding Defendants’ assertion of counterclaims and  
 5 agreement to conducting the First Action in phases, and its torrent of frivolous  
 6 filings during October and November 2013, among other things.

7 Defendants do not seek reimbursement of time expended by their attorneys  
 8 related to the following tasks, but do so without admission that all of this past work  
 9 will be useful to them in the Second Action:

- 10 • All work related to the claims and defenses raised in the parties’ lawsuit;
- 11 • All work related to settlement, including preparing for and participating
- 12 in mediation;
- 13 • All work related to Defendants’ motions to transfer and dismiss,
- 14 including drafting motions, researching, meeting and conferring with
- 15 Plaintiff’s counsel, and attending hearings;
- 16 • Drafting Defendants’ initial disclosures and first sets of requests for
- 17 production of documents and things and interrogatories;
- 18 • Reviewing Plaintiff’s initial disclosures;
- 19 • Participating in the parties’ Fed.R.Civ.P. 26(f) conference; and
- 20 • Drafting responses and objections to Plaintiff’s first set of document
- 21 requests.

22 Accordingly, the Court should order Plaintiff and/or its counsel to reimburse  
 23 Defendants’ attorneys’ fees in the amount of \$51,270.50.

### 24 **C. The Court Should Stay the Proceeding**

25 Fed.R.Civ.P. 41(d) plainly authorizes the Court to stay the proceedings  
 26 pending Plaintiff’s reimbursement of Defendants’ costs incurred in the First Action.  
 27 Alternatively, the Court should order Plaintiff and/or its counsel to pay all sums due  
 28 to Defendants within thirty days of the Court’s order, failing which sanctions will be

1 levied against Plaintiff and/or its counsel. *See Holt*, 2012 WL at \*10 (court ordered  
 2 plaintiff to pay award of costs over \$80,000 within thirty days). As yet another  
 3 alternative, the Court should order Plaintiff and/or its counsel to post security, bond,  
 4 or undertaking, consisting of a cash amount or valid corporate surety bond, with the  
 5 Court Clerk for costs in the amount of \$52,303.27 within fifteen days of the Court's  
 6 order, failing which the matter should be suspended or dismissed. *See Espinosa v.*  
 7 *Marshall*, 2007 WL 214439 (E.D. Cal. Jan. 26, 2007) (on defendant's Fed.R.Civ.P.  
 8 41(d) motion, the magistrate judge ordered plaintiff to post the above-described  
 9 bond; "[f]ailure to post security will result in a recommendation that this action be  
 10 dismissed . . . Unless and until security is posted, and with the exception of seeking  
 11 reconsideration of his order with the district judge, plaintiff shall not make further  
 12 filings in this lawsuit.")

#### 13 **IV. CONCLUSION**

14 For the reasons stated above, the Court should order Plaintiff and/or its  
 15 counsel to pay Defendants their costs expended in the First Action and not useful to  
 16 Defendants in the Second Action, as detailed above and in the attached declaration  
 17 of Paul Bost, and should stay these proceedings until Plaintiff and/or its counsel  
 18 have reimbursed Defendants in full.

19  
 20 Respectfully submitted,

21 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
 22

23 Dated: April 21, 2014

By: /s/ Paul A. Bost

24 Paul A. Bost

25 Attorneys for Defendants

26 SMRH:417717240.2

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 At the time of service, I was over 18 years of age and **not a party to this**  
4 **action.** I am employed in the County of Los Angeles, State of California. My  
5 business address is 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067-  
6 6055.

7 On April 21, 2014, I served true copies of the following document(s)  
8 described as **DEFENDANTS' MEMORANDUM OF POINTS AND**  
9 **AUTHORITIES IN SUPPORT OF THEIR MOTION FOR COSTS**  
10 **PURSUANT TO FED.R.CIV.P. 41(d)** on the interested parties in this action as  
11 follows:

12 James H. Freeman, Esq.  
13 J.H. Freeman Law  
14 3 Columbus Circle, 15 FL  
15 New York, NY 10019  
16 Tel: (212) 931-8535  
17 Fax: (212) 496-5870  
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steve@lowelaw.com

13 **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed  
14 the document(s) with the Clerk of the Court by using the CM/ECF system.  
15 Participants in the case who are registered CM/ECF users will be served by the  
16 CM/ECF system. Participants in the case who are not registered CM/ECF users will  
17 be served by mail or by other means permitted by the court rules.

18 I declare under penalty of perjury under the laws of the United States of  
19 America that the foregoing is true and correct and that I am employed in the office  
20 of a member of the bar of this Court at whose direction the service was made.

21 Executed on April 21, 2014, at Los Angeles, California.

22 /s/ Lynne Thompson  
23 Lynne Thompson  
24  
25  
26  
27  
28